No. 132, Original

In the Supreme Court of the United States

STATE OF ALABAMA, ET AL., PLAINTIFFS

v.

STATE OF NORTH CAROLINA

ON EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
CHARLES FINDLAY
BARCLAY T. SAMFORD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether sovereign immunity principles require the dismissal of the Southeast Low-Level Radioactive Waste Management Commission (Commission) as a plaintiff in this original action brought jointly by the Commission and four States against the State of North Carolina.

2. Whether the Southeast Low-Level Radioactive Waste Management Compact (Compact) authorizes the Commission to impose monetary sanctions against North Carolina in response to North Carolina's alleged breach of its obligations under the Compact.

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INTEREST OF THE UNITED STATES

This is an original action filed by four States and an interstate compact commission which seeks a remedy for the State of North Carolina's alleged breach of the Southeast Interstate Low-Level Radioactive Waste Management Compact (Southeast Compact or Compact).[1] Interstate compacts require congressional consent, see U.S. Const. Art. I, § 10, Cl. 3, and Congress enacted legislation approving the Southeast Compact, see Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act (Consent Act), Pub. L. No. 99-240, Tit. II, § 223, 99 Stat. 1871. At the

[1] The original version of the Southeast Compact is reproduced at 99 Stat. 1871-1880, but the Compact was amended with the consent of Congress in 1989. See Pub. L. No. 101-171, § 2, 103 Stat. 1289. For the Court's convenience, this brief cites the amended Compact as reproduced in the appendix to North Carolina's exceptions brief (N.C. App.).

Court's invitation, the United States filed two briefs during earlier stages of this litigation. The United States participated in proceedings before the Special Master with respect to the motions addressed in the Master's Preliminary Report.

In this brief, the United States expresses its views primarily about the issues addressed in the Preliminary Report, which concern principles governing original actions, the Compact's structure, and the Commission's powers. The United States did not participate before the Special Master on the more fact-intensive issues concerning whether North Carolina violated the Compact, and it does not address those issues here.

STATEMENT

1. In 1986, Congress enacted legislation consenting to a number of regional compacts addressing the disposal of low-level radioactive waste. Consent Act §§ 221-227, 99 Stat. 1860-1924. The Southeast Compact is one of those compacts. It was originally an agreement among eight States. Compact Art. 7(A), N.C. App. 22a.

The Compact established the Southeast Interstate Low-Level Radioactive Waste Management Commission (Southeast Commission or Commission), comprised of two representatives of each member State. Compact Art. 4(A), N.C. App. 8a. The Compact confers upon the Commission various "duties and powers," including the authority to designate "a host state for the establishment of a needed regional" waste-disposal facility. Art. 4(E) and (E)(7), N.C. App. 9a, 11a-12a. The Compact identifies various "rights and obligations" of Compact membership, including the ability of each member's in-state generators to use any regional disposal facilities and an obligation to serve as a host State if designated. Art. 3(A) and (C), N.C. App. 6a-7a.

Article 5(C) of the Compact provides that a host State "shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." N.C. App. 18a-19a. Subject to certain restrictions not at issue here, the Compact also provides that "any party state may withdraw from the compact by enacting a law repealing the compact." Art. 7(G), N.C. App. 25a.

Article 7(F) addresses situations in which a "party state * * * fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state." N.C. App. 24a. It provides that such a State "may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state." *Ibid.*

2. This case arises from the Southeast Commission's decision to sanction North Carolina for its alleged failure to comply with its obligations under the Compact. In 1986, the Commission designated North Carolina as the host State for a new regional waste-disposal facility to replace a pre-existing facility in South Carolina. Prelim. Rep. 2. Although the Compact provides that the Commission "is not responsible for any costs associated with * * * the creation of any facility," Art. 4(K)(1), N.C. App. 16a, "the Commission provided North Carolina with close to $80 million in assistance" between 1988 and 1997. Prelim. Rep. 2. On December 1, 1997, "the Commission * * * informed North Carolina that it would no longer provide funding for the project." Second Rep. 17. In response, North Carolina ceased efforts to obtain the necessary licenses. *Id.* at 10.

In June 1999, the Florida and Tennessee representatives filed a complaint against North Carolina with the Commission. Mot. for Leave to File Bill of Complaint App. 127a–131a (Mot. App.). In July 1999, North Carolina with-

drew from the Southeast Compact. Prelim. Rep. 8. In December 1999, the Commission held a hearing and concluded that North Carolina had "failed to fulfill the obligations incurred by becoming a party state to this Compact." Mot. App. 137a; Second Rep. 8. The Commission ordered North Carolina to "pay to the Commission the sum of $79,930,887, the amount of funds provided by the Commission to North Carolina," as well as interest, attorneys' fees, and $10 million for revenue the Commission would have received had North Carolina completed a facility. Mot. App. 137a. North Carolina did not participate in the hearing and did not comply with the Commission's order. Second Rep. 8.

3. In 2000, the Commission moved for leave to file a bill of complaint against North Carolina. North Carolina opposed that motion, arguing that the Commission could not invoke this Court's original jurisdiction. Br. in Opp. at 11-12, *Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n* v. *North Carolina*, 531 U.S. 942 (2000) (No. 131, Original) (*Original 131*). At this Court's invitation, 531 U.S. 942 (2000), the United States filed a brief urging denial of the Commission's motion because the proposed suit did not fall within this Court's exclusive original jurisdiction over "controversies between two or more States." 28 U.S.C. 1251(a); see U.S. Amicus Br. at 7-19, *Original 131*. The Court denied leave to file a bill of complaint. *Original 131*, 533 U.S. 926 (2001).

In 2002, the Commission and four of the compacting States (plaintiff States) filed a new motion for leave to file a bill of complaint. North Carolina opposed that motion as well, arguing that the addition of the plaintiff States as "nominal" parties did not bring the case within this Court's exclusive original jurisdiction and that the nature of the controversy did not warrant an exercise of original jurisdiction. Br. in Opp. 18-25. Again at this Court's invitation, 537

U.S. 806 (2002), the United States filed a brief, urging the Court to grant leave to file a bill of complaint. The Court granted plaintiffs' motion, 539 U.S. 925 (2003), and referred the case to a Special Master, 540 U.S. 1014 (2003).

4. The Court has before it exceptions to two Reports of the Special Master.

a. The Master's Preliminary Report addressed three motions. At the Master's invitation, the United States filed two briefs and participated in oral argument with respect to those motions.

i. The Preliminary Report recommended denial of North Carolina's motion to dismiss the Commission as a plaintiff based on sovereign immunity. Prelim. Rep. 4-14. The Master concluded "that a non-State party may join a State * * * in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." *Id.* at 5-6. The Master further determined that the Commission and the plaintiff States are "asserting the same claims and seeking the same relief." *Id.* at 6.

ii. The Preliminary Report also recommended denial of plaintiffs' motion for summary judgment on Count 1 of the bill of complaint, which seeks summary enforcement of the Commission's sanctions order. Prelim. Rep. 14-33. The Master concluded "that the Compact does not authorize the Commission to impose monetary sanctions on member States," *id.* at 27, and that, in any event, "North Carolina was not subject to the sanctions authority of the Commission because it withdrew from the Compact before sanctions were imposed," *id.* at 32. The Master also rejected plaintiffs' argument "that North Carolina waived its right to contest the legality of the Commission's sanctions order by refusing to participate in the sanctions hearing." *Ibid.*

iii. The final motion addressed in the Preliminary Report is North Carolina's motion to dismiss for failure to state a claim. Prelim. Rep. 33-43. The Preliminary Report recommended that motion be granted only with respect to Count 1, described above. *Id.* at 34. The Master explained that the remaining counts "assert various legal and equitable claims against North Carolina," *id.* at 34-35, and he rejected North Carolina's argument that plaintiffs "cannot seek a judicial remedy beyond the remedies prescribed by the Compact," *id.* at 34.

b. The Master did not immediately file his Preliminary Report with the Court. Instead, the parties conducted discovery and filed cross motions for summary judgment, which are addressed in the Master's Second Report. The United States did not participate in discovery or in the proceedings before the Special Master with respect to those motions.

i. The first motion addressed in the Second Report is plaintiffs' motion for summary judgment on Count 2, which asks this Court to declare that North Carolina breached the Southeast Compact and to fashion an appropriate remedy. The Master recommended that motion be denied, Second Rep. 8-35, and that North Carolina be granted summary judgment on that count "[f]or substantially the same reasons," *id.* at 35. The Master rejected plaintiffs' contention that the Commission's determination of breach was "conclusive" or "entitled to substantial deference" in this proceeding. *Id.* at 19. The Master also concluded that North Carolina did not violate its obligation under Article 5(C) "to take 'appropriate steps' towards licensing of a disposal facility," *id.* at 20, and he rejected plaintiffs' claim that North Carolina's withdrawal from the Compact violated an implied covenant of good faith and fair dealing, *id.* at 29-35.

ii. The Master's Second Report also discussed, but did not make a recommendation regarding, North Carolina's motion for summary judgment on Counts 3-5, which seek relief on the equitable theories of unjust enrichment, promissory estoppel, and money had and received, respectively. The Master concluded that resolution of those claims would, "[a]t a minimum, * * * require further briefing and argument, and perhaps further discovery." Second Rep. 45. The Master decided not to delay further the filing of his Reports to conduct those proceedings, because he concluded that "there may be no need to consider" those Counts if this Court rejects the recommendations contained in the Master's Preliminary and Second Reports. *Id.* at 41.

SUMMARY OF ARGUMENT

I. North Carolina's motion to dismiss the Commission based on sovereign immunity should be denied. This Court has squarely held that a State's immunity is not violated when a non-State party joins in an original action brought by a State or the United States, so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs. That holding has not been called into doubt by later decisions, and North Carolina provides no valid reason for departing from it.

At this point in the suit, the Commission is pursuing the same claims and seeking the same relief as the plaintiff States. The Court should not entertain North Carolina's argument that the Commission should be dismissed because the plaintiff States cannot ultimately succeed on the claim they are making initially with the Commission—for restitution of the approximately $80 million that North Carolina received to assist it in developing a new regional facility. North Carolina's argument goes to the merits of the plaintiff States' claims, and the Special Master specifi-

cally declined to resolve the "complex issues" (Second Rep. 46) raised by those claims on the ground that an immediate ruling by this Court on the issues addressed in the Preliminary and Second Reports would best advance the efficient resolution of this litigation. The Master's case-management determinations were reasonable, and this Court should not indulge North Carolina's attempt to end-run them.

II. The Court should deny plaintiffs' request for summary enforcement of the Commission's sanctions order because the Compact does not authorize the Commission to impose monetary sanctions against a party State. Although the Compact authorizes "sanctions," the Compact's language and the surrounding context demonstrate that power does not include the ability to impose a monetary penalty.

The two sanctions expressly mentioned in Article 7(F)—suspension of rights and revocation of party status—both deny a member State some or all of the benefits of Compact membership on a going-forward basis. Although other provisions repeatedly mention the possibility of expelling a State that fails to live up to its obligations, nothing in the Compact indicates that the Commission has the authority to levy a substantial monetary sanction against a sovereign State. This silence is particularly telling given that the States traditionally have immunity from monetary assessments, and that several other compacts approved by Congress in the same Act expressly authorize their commissions to require monetary payments by current or former member States. Finally, the Court should reject plaintiffs' assertion that deference is owed to the Commission's assessment about the scope of its own sanctioning authority or to the Commission's determination that North Carolina violated its obligations under the Compact.

ARGUMENT

I. THE COURT SHOULD DENY NORTH CAROLINA'S MOTION TO DISMISS THE COMMISSION BASED ON NORTH CAROLINA'S SOVEREIGN IMMUNITY

North Carolina contends that sovereign immunity principles require dismissal of all claims brought by the Southeast Commission. North Carolina argues (at 27-39) that it has a right not to be a defendant in any action in which the Commission is a plaintiff. North Carolina also asserts (at 39-55) that, even if the Commission could be a plaintiff with respect to claims that were identical to those of the plaintiff States, the Commission's claims must still be dismissed because the States are not entitled to bring the same claims: "as a matter of law and fact, only the Commission can pursue restitution of the $80 million" that it paid to North Carolina to assist in developing a new regional facility. *Id.* at 40.

North Carolina's first exception should be overruled. This Court has never addressed whether States have sovereign immunity from suits brought by entities like the Southeast Commission.[5] But even assuming that they do, that immunity is not violated when a non-State party joins in an original action brought by a State, so long as the non-

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[5] This Court has twice held that a particular Compact Clause entity was not immune from suit by private parties in federal court, and it has stated that "there is good reason not to amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); see *Lake County Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-402 (1979). In its amicus brief in *Original 131*, the United States stated (at 13) that "a suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment."

State party asserts the same claims and seeks the same relief as the other plaintiffs.

As the Special Master correctly determined (Prelim. Rep. 14), at this point in the litigation, "the Commission and the [plaintiff] States are asserting the same claims and seeking the same relief." North Carolina argues that the plaintiff States are not *entitled* to assert some of those claims or seek one of those remedies. But the Special Master reasonably concluded that those issues—which go to the merits of the plaintiff States' claims—could not and need not be resolved at this stage of the litigation. That case-management decision was reasonable, and the Court should not permit North Carolina to conduct an end-run around it.

A. A Non-State Party May Participate In A Suit That Is Properly Instituted Under This Court's Original Jurisdiction So Long As It Does Not Bring New Claims Against A Defendant State

1. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

"Although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts," this Court has viewed "the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)). The Court has determined that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States

enjoyed before the ratification of the Constitution, and which they retain today * * * except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999).

2. This Court has recognized, however, that the Eleventh Amendment does not necessarily bar a non-State party from participating in a suit that is otherwise properly commenced under the Court's original jurisdiction. In *Arizona* v. *California*, No. 8, Original, Arizona sued California to determine their respective rights to use the Colorado River. The United States intervened to assert various water rights on behalf of five Indian Tribes, *Arizona* v. *California*, 373 U.S. 546, 551, 595 (1963), and the Tribes subsequently moved to intervene to assert those claims on their own behalf, *Arizona* v. *California*, 460 U.S. 605, 612 (1983) (*Arizona II*).

This Court unanimously rejected the States' argument that granting the Tribes' motion would "violate[] the Eleventh Amendment." *Arizona II*, 460 U.S. at 614. The Court "[a]ssum[ed], *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe." *Ibid.*; see *Blatchford*, 501 U.S. at 781-782 (so holding). But the Court held that "the States involved no longer may assert that immunity with respect to the subject matter of this action." *Arizona II*, 460 U.S. at 614. The Court reaffirmed that States have no immunity from suits brought by the United States, and it emphasized that "[t]he Tribes d[id] not seek to bring new claims or issues against the States, but only ask[ed] leave to participate in an adjudication of their vital water rights that was commenced by the United States." *Ibid.* Under those circumstances, the Court determined that its "judicial power over the controversy [would] not be enlarged by granting [the Tribes]

leave to intervene" and that the State's sovereign immunity would "not [be] compromised" by doing so. *Ibid.*

Arizona II is directly on point. This Court has long recognized that, by ratifying the Constitution, the States consented to suits by each other, see, *e.g.*, *South Dakota* v. *North Carolina*, 192 U.S. 286, 318 (1904), and four of North Carolina's sister States are plaintiffs in this action. As a result, *Arizona II* establishes that no Eleventh Amendment violation exists so long as the Commission does not "seek to bring new claims or issues against" North Carolina. 460 U.S. at 614. Cf. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981) (permitting private parties to intervene in an original action against a State); *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (noting that "[n]umerous parties" had been permitted to intervene in an original action between two States).[8]

8. a. North Carolina does not directly ask this Court to overrule its unanimous Eleventh Amendment holding in *Arizona II*, and it identifies no warrant for doing so. North Carolina does not assert that the rule announced in *Arizona II* is "unworkable," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991), or that "experience has pointed up the precedent's shortcomings," *Pearson* v. *Callahan*, 129 S. Ct. 808,

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[8] A non-State party, of course, may be precluded from participating on some other basis, not involving the Eleventh Amendment. See *Arizona II*, 460 U.S. at 613-614 (addressing separately the arguments that intervention would violate the Eleventh Amendment and that intervention was unwarranted for other reasons). In *South Carolina* v. *North Carolina*, No. 138, Original, the Court will address the proper standards for intervention by non-State parties in an interstate water adjudication. This case, however, does not involve an attempt by a non-State party to "force [its] way, through intervention, into a dispute between sovereigns." U.S. Amicus Br. at 10, *South Carolina* v. *North Carolina*, *supra*.

816 (2009). *Arizona II* was not "decided by the narrowest of margins" or "over spirited dissents challenging the basic underpinnings of [the Court's] decision[.]" *Payne*, 501 U.S. at 828-829. And its holding has not "been questioned by Members of the Court in later decisions." *Id.* at 829-830. Cf. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676-678 (1999) (noting that four Justices had dissented in *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), and that *Parden* had been criticized and narrowed by later decisions).

b. North Carolina relies principally (at 31-34) on *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). Those cases arose from different facts, concerned different legal questions, and do not at all undermine *Arizona II*.

In *Pennhurst*, the Court held that the Eleventh Amendment bars private parties from suing a state official in federal court for a violation of state law. See 465 U.S. at 103-125. *Pennhurst* was not an original jurisdiction case, and it does not address situations in which the claims of a non-State party are the same as those asserted by a State or the United States. Although the United States was a party to *Pennhurst*, the private parties' claims were not identical to those of the United States. To the contrary, the Court thought it "clear that the United States does not have standing to assert the state-law claims of third parties." *Id.* at 103 n.12. *Pennhurst* also involved the uniquely sensitive issue of a federal court's enforcement of state law against an arm of the State. See *id.* at 106 (stating that "it is difficult to think of a greater intrusion on state sovereignty").

In *County of Oneida*, three Indian Tribes sued two New York counties in federal district court, alleging that the

State of New York had obtained county lands in violation of the Trade and Intercourse Act of 1793, ch. 19, 1 Stat. 329, and that the transaction was void as a result. 470 U.S. at 229. The counties attempted to join the State as a third-party defendant, asserting that the court could exercise ancillary jurisdiction over the counties' cross-claim for indemnity. *Id.* at 250-251. This Court concluded that the Eleventh Amendment barred the cross-claim because it raised a question of state law and because the counties failed to demonstrate that the State had waived its immunity. *Id.* at 251-252. Because neither the United States nor another State was a plaintiff in *County of Oneida*, the Court had no occasion to consider whether and under what circumstances the Eleventh Amendment would have barred the counties from participating in a suit brought by the United States or another State against New York.

Since *Pennhurst* and *County of Oneida* were decided, moreover, the Court rendered a second decision in *Arizona v. California* addressing claims brought by and on behalf of an Indian Tribe. The Court noted that its earlier decision had permitted the Tribes to intervene, without questioning that ruling. See 530 U.S. 392, 399 (2000). And the Court went on to consider further the claims of one of those Tribes, assuming that the Tribe was an appropriate party to the proceeding. See *id.* at 406-418; see also 547 U.S. 150, 151 (2006) (consolidated decree)

c. Contending that sovereign immunity determinations must be made on a claim-by-claim basis, North Carolina suggests repeatedly (at 32-33, 36, 38-39) that the addition of each new plaintiff creates a distinct "claim" for Eleventh Amendment purposes, even if all of the plaintiffs assert that the defendant violated the same legal obligation and seek the same remedy. North Carolina cites no support for that

proposition, and it is contrary to this Court's unanimous holding in *Arizona II*.

North Carolina's argument also is inconsistent with the Court's analysis in *Pennhurst*. *Pennhurst* did not hold that the presence of the United States in the suit was categorically irrelevant for Eleventh Amendment purposes. Instead, the Court's decision was based on the more limited principle that "the United States' presence in the case for *any* purpose does not eliminate the State's immunity for *all* purposes." 465 U.S. at 109 n.12 (emphases added). The Court gave an example, noting that the Eleventh Amendment would bar a federal court from bootstrapping its ability to award an injunction to the United States into an ability to award money damages to a private party. *Ibid.* And as noted above, the Court remarked that it was "clear that the United States d[id] not have standing to assert the state-law claims of third parties." *Ibid.* Both observations would have been unnecessary if North Carolina were correct that the simple addition of a new plaintiff—even if that plaintiff asserts identical claims and seeks the same relief—invariably creates a new "claim" for sovereign immunity purposes.

d. North Carolina is correct (at 35) that this Court has understood sovereign immunity as based on something more than jurisdictional limits. See *Alden*, 527 U.S. at 713, 730. North Carolina also is correct (at 38) that, in circumstances in which States have sovereign immunity, they may restrict any waiver of that immunity to certain claims, see *id.* at 758 (state law claims but not analogous federal law claims), or to suits brought in certain fora, see *College Sav. Bank*, 527 U.S. at 676 (state court but not federal court). But there is no conflict between those principles and *Arizona II*. *Arizona II* simply recognizes that, when a State does not have sovereign immunity against certain claims (as

here, because they were brought by other States), then the State's sovereign immunity "is not compromised" by the participation of an additional party in the suit with respect to that same claim. 460 U.S. at 614.

B. The Commission Is Not Seeking To "Bring New Claims" Against North Carolina

As explained in the previous Section, the Commission's participation in this suit does not implicate North Carolina's sovereign immunity so long as the Commission "do[es] not seek to bring new claims or issues against" North Carolina beyond those asserted by the plaintiff States. *Arizona II*, 460 U.S. at 614. As the Special Master correctly determined (Prelim. Rep. 14), the bill of complaint is consistent with that standard. The complaint identifies the plaintiff States and the Southeast Commission as the plaintiffs (Compl. para. 9); it states the claims jointly on behalf of all the plaintiffs (*id.* paras. 62-86); and it makes no distinctions among the plaintiffs with respect to the relief sought (*id.* Prayer for Relief paras. 1-4).

Nor do any post-filing developments require dismissal of the Commission. The Special Master has recommended that this Court dismiss the portions of the bill of complaint that request enforcement of the Commission's sanctions order, Prelim. Rep. 34, and grant summary judgment to North Carolina with respect to Count 2, Second Rep. 35-40. Those recommendations, however, apply equally to the Commission and the plaintiff States. And although North Carolina excepts to the Master's failure to recommend granting its motion for summary judgment on Counts 3-5 (N.C. Exc. Br. i, 56-59), it does so on grounds that are equally applicable to all the plaintiffs. See note 5, *infra*. Accordingly, because the plaintiff States and the Commission continue to assert the same claims and seek the same

relief, the Commission's continued participation is consistent with *Arizona II*. And if circumstances were to change, North Carolina could at that time renew its motion to dismiss the Commission or to preclude consideration of any claims pressed by the Commission alone.

C. North Carolina's Assertion That The Plaintiff States Have No Claim To The Approximately $80 Million That It Received Does Not Warrant Dismissal Of The Commission

North Carolina does not deny that the plaintiff States and the Commission are asserting the same claims and seeking the same relief. Instead, North Carolina contends (at 40) that its first exception should be granted because, "as a matter of law and fact, only the Commission can pursue restitution of the $80 million" that North Carolina received to assist it in licensing an appropriate facility. But that argument goes to the *merits* of the claims insofar as they are advanced by the plaintiff States, and the Master deferred consideration of the merits of the restitution issue. The Court should not entertain North Carolina's attempt to use a motion to dismiss the Commission on *jurisdictional* grounds as a vehicle for reaching the merits in the face of the Master's deferral.[4]

The Special Master did not extensively discuss and did not make any recommendations with respect to the various

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[4] North Carolina's request for dismissal of "*all claims brought by*" the Commission (N.C. Exep. Br. i) also is overbroad because the Commission has sought relief other than restitution. For example, the complaint asks the Court to declare that the Commission's sanctions order is "subject to enforcement," Prayer for Relief para. 3, and to "[a]ward Plaintiffs such damages, costs and further relief as this Court deems just and proper," *id.* para. 4. Accordingly, even if only the Commission could pursue restitution, such a conclusion would at most warrant a dismissal as to that particular request for relief, and not an across-the-board dismissal of the Commission as a party.

"complex issues" (Second Rep. 46) raised by the plaintiff States' request for restitution. To the contrary, the Master determined that those issues "cannot be resolved now," and he identified various questions that would "require[] further briefing and argument, and possibly further discovery." *Id.* at 41. The Master concluded that judicial efficiency would best be served by deferring consideration of those issues and obtaining an immediate decision by this Court regarding the issues addressed in the Preliminary and Second Reports. *Id.* at 48.

That method of proceeding is reasonable and within the Master's discretion. To be sure, the Master also could have decided to hold off filing any Reports until he was able to recommend a disposition with respect to all of plaintiffs' claims. See 540 U.S. at 1014 (authorizing the Master "to direct subsequent proceedings" and instructing him "to submit such Reports as he may deem appropriate"). But the Master identified appropriate reasons for deferring consideration of whether the plaintiff States may seek restitution, either as a remedy for plaintiffs' breach of contract claim asserted in Count 2 or on one of the various equitable theories alleged in Counts 3-5. Because the Master has recommended that the Court grant summary judgment to North Carolina on the question of liability on Count 2, see Second Rep. 35-40, there may be no need to decide any issues relating to remedy on that Count. *Id.* at 45. And plaintiffs assert the various equitable claims in Counts 3-5 only as an alternative to recovery on Counts 1 and 2. See *id.* at 41 (so stating with respect to Count 2). Accordingly, there "may be no need to consider" whether the plaintiff States may assert those equitable claims if the Court determines that plaintiffs are entitled to relief on Counts 1 or 2. *Ibid.*

Even if the various issues raised by the plaintiff States' request for restitution remain relevant after the Court resolves the parties' other exceptions, the Court should decline North Carolina's request to resolve those issues at this time. As noted, North Carolina is asking the Court to reject some of the plaintiff States' claims on the merits as a predicate to dismissing the Commission based on sovereign immunity. A number of the "complex issues" (Second Rep. 46) that the Special Master identified about the plaintiff States' request for restitution involve delicate issues of interstate relations about which this Court's existing precedents do not provide clear guidance. See *id.* at 41-48. Moreover, further factual development before the Master may reveal that some or all of those issues need not be addressed in this case. Cf. Second Rep. 29 (concluding that it was unnecessary to determine whether a duty of good faith and fair dealing applies to interstate compacts because, even if it did, "the record contains no evidence that North Carolina acted in bad faith"). Accordingly, North Carolina's first exception should be overruled.[5]

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[5] The Court should overrule North Carolina's second exception for similar reasons. In that exception, North Carolina objects to the Special Master's failure to recommend dismissal of Counts 3-5, arguing that "where the parties' relationship concerning a given subject matter is governed by the terms of an express contract, no equitable claim will lie in addition [to] a claim for breach of contract." N.C. Exep. Br. i. As North Carolina acknowledges (*ibid.*), the Special Master has not addressed that argument. In addition, like North Carolina's other arguments about Counts 3-5, this issue may be rendered moot depending on the Court's resolution of Counts 1 and 2.

II. THE SOUTHEAST COMPACT DOES NOT AUTHORIZE THE COMMISSION TO IMPOSE MONETARY SANCTIONS

Plaintiffs contend (at 17-23) that the Special Master erred in concluding that the Southeast Compact does not authorize the Commission to impose monetary sanctions against a party State. That exception should be overruled. The Compact's terms, the Compact's structure, and the reasonable expectations of Congress and the compacting parties all demonstrate that the Special Master's conclusion is correct.[4]

1. An interstate compact is not simply an agreement among the compacting States. When Congress consents to an interstate compact, it "transforms" the parties' agreement "into a law of the United States." *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981). Thus, although the Southeast Compact "is * * * a contract," *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted), the Court interprets it "[j]ust as if [it] were addressing a federal statute." *Virginia* v. *Maryland*, 540 U.S. 56, 66 (2003) (first brackets in original) (quoting *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998)).

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[4] Plaintiffs' list of exceptions also identifies the Special Master's conclusion that "North Carolina did not waive its right to contest the legality of the sanctions proceedings even though it attended and refused to participate in the hearing." Pls.' Exp. 2. Beyond noting that "North Carolina was in attendance [at] but refused to participate" in the hearing (Br. 17), however, plaintiffs do not address that issue in the body of their brief. Under these circumstances, the Court may wish to deem plaintiffs' third exception abandoned. Cf. 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3974.1, at 254-255 (2008) (stating that, in proceedings before the courts of appeals, "[l]itigants must bear in mind that the failure to properly argue their contentions [in the argument section of an opening brief] may well result in a finding of abandonment").

2. a. The language most directly at issue is contained in the first sentence of Article 7(F). That sentence provides:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state.

Compact Art. 7(F), N.C. App. 24a.

Because the Compact does not define the term "sanctions," its proper interpretation starts with "ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). As used in this context, a "sanction" is "a restrictive measure used to punish a specific action or to prevent some future activity." *Webster's Third New International Dictionary* 2009 (1993); accord *Black's Law Dictionary* 1341 (7th ed. 1999) ("A penalty or coercive measure that results from failure to comply with a law, rule, or order.").

Plaintiffs assert (at 18) that a general reference to "sanctions" is best read to include "monetary sanctions." That sometimes may be the case. But a "word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006). Here, the authority upon which petitioner relies—this Court's decision in *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992) (*Department of Energy*)—fails to demonstrate that the term "sanctions" in this Compact includes monetary penalties. By its terms, the statutory provision at issue in *Department of Energy* made clear that its use of the word "sanctions" encompassed "civil penalties." *Id.* at 620 (quoting 33 U.S.C. 1323(a)). For that reason, the question of the permissibility of monetary sanctions was not

even an issue in that case. By contrast, the Southeast Compact contains no such reference to "civil penalties" or otherwise to monetary relief. Accordingly, the holding of *Department of Energy* does not aid plaintiffs here.

Article 7(F)'s provision that possible sanctions "includ[e] suspension of [a State's] rights under this compact and revocation of its status as a party state" fails to demonstrate that the Compact *also* authorizes monetary penalties —and indeed, more nearly suggests the contrary. Of course, plaintiffs are correct (at 19) that "include" is not a term of limitation, and Article 7(F)'s use of that word suggests that the available sanctions are not confined to the two specified measures. At the same time, the Compact's identification of two specific sanctions was presumably intended to serve some purpose, as suggesting the general class of sanctions authorized. And both named sanctions describe a measure that denies a party State some or all of the benefits of Compact membership on a prospective basis, rather than one that directs a backwards-looking monetary payment. As such, the specific references in Article 7(F) indicates sanctions different in both purpose and nature than the ones the Commission sought to impose.

b. Other Compact provisions support the view that Article 7(F) should be understood as confining the Commission to measures that share the core characteristic of withholding benefits of Compact membership. See *Department of Energy*, 503 U.S. at 622 (stating that a "term's context * * * may supply a clarity that the term lacks in isolation"). For example, Article 4 creates the Commission and sets forth eleven specific "duties and powers." Compact Art. 4(E), N.C. App. 9a-18a. Article 4(E)(7) empowers the Commission to designate a host State, and provides that "[t]he Commission shall have the authority to revoke the membership of a party state that willfully creates barriers

to the siting of a needed regional facility." N.C. App. 12a. Another provision authorizes the Commission to "revoke the membership of a party state in accordance with Article 7(F)." Compact Art. 4(E)(11), N.C. App. 13a. By explicitly granting the Commission the power to revoke a party State's membership, Congress and the compacting States could fairly have understood that the Compact also granted the Commission the lesser-included power of suspending a party State's rights or benefits under the Compact, an inference confirmed by the text of Article 7(F). But Article 4(E) contains no indication that the "duties and powers" of the Commission include the ability to compel a party State to pay a potentially substantial monetary sanction.

Similarly, Article 6(B) provides that "[n]o party state shall pass any law or adopt any regulation which is inconsistent with this compact," and that "do[ing] so may jeopardize the membership status of the party state." N.C. App. 21a. Here too, however, the Compact gives no indication that the enactment of an offending law or regulation has the additional effect of subjecting the State to a Commission-imposed monetary sanction.

c. Plaintiffs err in asserting (at 20) that the final sentence of Article 7(F)'s first paragraph is "meaningless" unless the Commission may impose monetary fines. That sentence reads: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Compact Art. 7(F), N.C. App. 25a.

The "rights and obligations" of party status referred to in this sentence are set out in Article 3 of the Compact, whose caption reads "rights and obligations." N.C. App. 6a. For example, Article 3(A) provides that "each party state" shall "have the right" to access and use a regional storage

facility. N.C. App. 6a. Article 3(C) requires "[e]ach party state [to] establish the capability" to serve as a host State, and Article 3(B) states that a "party state" that is not a host State "may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility." N.C. App. 7a.

On its own terms—and especially when read in light of Article 3—the sentence on which plaintiffs rely actually undermines their claim that the Commission may impose monetary sanctions. That sentence links a party State's ability to exercise the rights, and its duty to comply with the obligations, of Compact membership to the date of the Commission's sanctions order, something that makes perfect sense if the authorized sanctions relate to Compact membership. On this reading, the "or as provided" clause simply grants the Commission leeway to decide how to implement a suspension or revocation order, such as by permitting generators from a State whose rights have been suspended a reasonable amount of time to make alternate arrangements or by relieving a State whose expulsion will not take effect until a later date of some of the obligations of Compact membership. In contrast, it is difficult to imagine why or how the imposition of a monetary sanction would have any impact on an offending State's "rights and obligations" under the Compact. The imposition of a fine is perfectly consistent with the continuation of the rights and obligations of group membership

d. The Southeast Compact was drafted against, and should be interpreted in light of, background assumptions about state sovereignty. See Compact Art. 3, N.C. App. 6a ("The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights."). One traditional aspect of

that sovereignty is an immunity from monetary assessments, whether imposed by courts or non-judicial actors. See, *e.g.*, *FMC* v. *South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974). Given that tradition, if Congress and the States had intended to empower the Commission to impose multi-million dollar monetary sanctions on a State, potentially affecting all its sovereign functions, the Compact would have expressly granted such authority.

Requiring a clear statement in this context would serve several purposes. Here, as elsewhere, it would ensure that the legislature of each State that joined the Compact, as well as Congress in approving it, "has in fact faced" and considered the question whether a non-judicial compact commission should be permitted to impose a monetary sanction against a sovereign State. *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (citation omitted). In addition, a presumption that a compact commission may not impose monetary sanctions against a State absent a clear statement to that effect would serve the broader goal—which is embodied in the Compact Clause itself, U.S. Const. Art. I, § 10, Cl. 3—of encouraging States to resolve their differences and address issues of multistate and national concern through mutual agreement. Under such a rule, States could be assured that, by entering into an interstate compact, they will not inadvertently expose themselves to uncertain and potentially substantial monetary liability without the benefit of proceedings in a judicial forum.

Plaintiffs assert (at 20) that "it is inappropriate to impose a clear-statement rule on the interpretation of a contract among co-equal sovereign states." But the Southeast Compact is not simply a "contract among" the party States. It is also "a law of the United States," *Texas* v. *New Mexico*, 482 U.S. at 128, and is thus subject to the same princi-

ples that govern the interpretation of federal statutes, which are subject to a number of clear-statement rules.

e. The Southeast Compact's failure to make any mention of a power to impose monetary sanctions is particularly significant in light of other similar interstate compacts specifically granting such power. Several interstate compacts addressing treatment of low-level radioactive waste—approved by Congress in the selfsame Act as the Southeast Compact—expressly authorize their commissions to fine member States. See *Texas* v. *New Mexico*, 462 U.S. 554, 565 (1983) (citing "[o]ther interstate compacts, approved by Congress contemporaneously," in construing the Pecos River Compact).[7] For example, the Northeast Interstate Low-Level Radioactive Waste Management Compact authorizes its commission to "impose sanctions, including but not limited to, *fines*, suspension of privileges and revocation of the membership of a party state." Art. IV(1)(14), 99 Stat. 1915 (emphasis added). The Central Interstate Low-Level Radioactive Waste Compact empowers its commission to

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[7] Plaintiffs assert (at 22 n.7) that *Texas* v. *New Mexico* is inapposite because "the undisputed record shows that the party States were not aware of the language of other interstate low-level radioactive waste compacts when they negotiated the Southeast Compact." But the Court did not undertake such an inquiry in *Texas* v. *New Mexico*, and plaintiffs cite no evidence that the drafters of the Pecos River Compact were aware of the language of the other compacts to which the Court referred. In any event, the Compact at issue here and the others discussed in the text were enacted by Congress; they are not merely agreements among the participating States. The simultaneous enactment of the compacts in a single Act of Congress reinforces the conclusion that the differences in their sanctions provisions—and in particular the absence of any provision for monetary sanctions in the Southeast Compact—should be given effect. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

require a party State whose membership is revoked to "pay to the Commission" certain specified monetary penalties. Art. VII(e), 99 Stat. 1870. And the Central Midwest Interstate Low-Level Radioactive Waste Compact directly addresses a situation that tracks what plaintiffs assert occurred here—and provide for monetary penalties in response. That compact provides that, if "[a] designated host state * * * withdraws from the compact * * * prior to fulfilling its obligations," the compact commission "shall * * * assess[]" against that State "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Art. VIII(f), 99 Stat. 1891. The Southeast Compact contains no comparable provision.

f. There is no reason to believe that an ability to impose monetary sanctions was necessary to ensure the effectiveness of the Southeast Compact. Cf. Compact Art. 9, N.C. App. 27a-28a ("The provisions of this compact shall be liberally construed to give effect to the purposes thereof."). The Northwest Interstate Compact on Low-Level Radioactive Waste Management Art. V, 99 Stat. 1862-1863, for example, includes no provision at all for the Commission to sanction party States. See also Rocky Mountain Low-Level Radioactive Waste Compact Art. VII(e) and (f), VIII(e), 99 Stat. 1908-1909 (authorizing compact commission to impose a "civil penalty" against "[a]ny person who violates" certain provisions, but only authorizing "exclus[ion]" of a party State).[5] As the Master observed (Prelim. Rep. 21), a State

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[5] Plaintiffs contend (at 22) that, "[u]nder the Special Master's reasoning," the comparison between the Rocky Mountain Compact's authorization of "exclusion" and the Southeast Compact's authorization of "sanctions" denotes that the Southeast Compact "authorize[s] sanctions *beyond* exclusion." As explained above, the Southeast Compact does authorize sanctions other than exclusion. See p. 22, *supra*. But the

that loses compact membership necessarily loses the benefits expected to attach to that membership—including the right to dispose of its own waste at a regional facility. See Compact Art. 3(A), N.C. App. 6a. And even though the Commission cannot itself impose monetary sanctions, a State that breaches the Compact and then withdraws is not necessarily protected from monetary liability. Rather, as the Master also recognized (Prelim. Rep. 37-40), this Court may award damages or other appropriate relief for breach of an interstate compact. See, e.g., *Texas* v. *New Mexico*, 482 U.S. at 128; *Texas* v. *New Mexico*, 462 U.S. at 569-570.

3. Plaintiffs suggest (at 18) that the Court should defer to the Commission's determination that it can impose monetary sanctions. As the Special Master correctly concluded (Prelim. Rep. 26-27), the Commission's views about the scope of its own sanctioning authority—which appear to have been first articulated in the sanction proceeding at issue here—do not warrant any special deference. An interstate compact entity that consists of representatives of member States, see Compact Art. 4(A), N.C. App. 8a, is not equivalent to a federal agency charged with administering an Act of Congress. The Compact does not grant the Commission any general authority to construe its terms, cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989), and the Compact contains no more specific indication that Congress assigned to the Commission the authority to determine the scope of permissible sanctions, cf. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). While the Commission's well reasoned views may constitute a body of experience and informed judgment to which

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question here is: *Which* sanctions other than exclusion does the Compact authorize? In resolving that question, the relevant comparison is with compacts that, unlike the Southeast Compact, make clear that they authorize monetary assessments against a party State.

courts may properly resort for guidance, its views about the scope of its own powers cannot supplant a fair reading of the Compact's terms. Cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 227-228 (2001).

4. Plaintiffs also err in contending (at 25-30) that this Court should defer to the Commission's determination that North Carolina violated its obligations under the Compact. Plaintiffs rest that assertion on language in the second sentence of Article 7(C), which reads: "The Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact." N.C. App. 23a.

As its full text suggests—and the surrounding context confirms—the sentence in question does not mean what plaintiffs assert. The Compact does not provide that "this suit may be maintained only as one for judicial review of the Commission's" own determination of breach. *Texas* v. *New Mexico*, 462 U.S. at 567. Moreover, the provision on which plaintiffs rely is not contained in Article 4(E), which addresses the general "duties and powers" of the Commission, N.C. App. 9a-18a, or in Article 7(F), which addresses situations in which a "party state * * * fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state," N.C. App. 24a. Instead, the provision is contained in Section (C) of Article 7, which is preceded and followed by other sections in Article 7 that describe the process by which States become eligible for compact membership and the initial organization of the Commission. Indeed, Section (C)'s own first sentence addresses the process by which eligible States become Compact members. N.C. App. 23a.

When viewed in that context, the function of the sentence in question becomes clear: it grants to the Commission, rather than to individual party States or prospective member States, ultimate authority to determine whether a prospective member has satisfied the conditions for Compact membership. At any rate, the language of Article 7(C) is insufficient to displace this Court's independent judgment in the exercise its constitutionally prescribed role as arbiter of controversies between States. See *Texas* v. *New Mexico*, 462 U.S. at 566-571. Furthermore, the Commission's finding of a violation here occurred in a proceeding to impose monetary sanctions, which is a power that the Commission does not have. For those reasons, plaintiffs' fourth exception should be overruled as well.

5. Plaintiffs' second exception addresses the Master's alternative recommendation that the sanctions order is invalid because North Carolina "withdrew from the Compact before sanctions were imposed." Prelim. Rep. 32. Because that exception presupposes that the Commission may sometimes impose monetary sanctions, it should be overruled as well.[9]

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[9] If the Court sustains plaintiffs' first exception and concludes that the Commission can impose monetary sanctions, it probably should sustain plaintiffs' second exception as well. Were the Compact construed to permit the Commission to order North Carolina to return the funds it received during its Compact membership, North Carolina should not be allowed to avoid that obligation by exercising a unilateral right to withdraw. Perhaps for that reason, other compacts that expressly permit their commissions to require monetary payments also provide that the duty to make such payments survives termination of compact membership. See Central Interstate Compact Art. VII(d) and (e), 99 Stat. 1870; Central Midwest Compact Art. VIII(d) and (f), 99 Stat. 1891.

CONCLUSION

Plaintiffs' first, second, and fourth exceptions should be overruled. Both of North Carolina's exceptions should be overruled.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
CHARLES FINDLAY
BARCLAY T. SAMFORD
Attorneys

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